

Fireman's Fund Ins. Co. v Gotham Ins. Co.
2025 NY Slip Op 35408(U)
January 6, 2025
Supreme Court, Westchester County
Docket Number: Index No. 66982/2022
Judge: Paul I. Marx
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER
HON. PAUL I. MARX, J.S.C.

-----X
FIREMAN'S FUND INSURANCE COMPANY and
OXFORD GARDENS OWNERS CORP.

Plaintiffs,

-against-

GOTHAM INSURANCE COMPANY,

Defendant.
-----X

To commence the statutory
time period for appeals as of
right (CPLR 5513 [a]), you
are advised to serve a copy
of this order, with notice of
entry, upon all parties.

Index No. 66982/2022

DECISION AND ORDER

Motion Seq. No. 3 & 4

The papers filed electronically via NYSCEF and numbered as documents 63 through 66 and 70 through 92¹ were read on: (1) Plaintiffs' motion seeking (a) reargument of this Court's Decision and Order dated April 3, 2024, and (b) upon reargument, granting Plaintiffs summary judgment and denying Defendants' cross motion in its entirety, (motion seq #3) and (2) Defendant's cross motion seeking an order (a) denying Plaintiffs' motion to reargue,² (b) granting Defendant Summary Judgment (motion seq #4).

BACKGROUND

Familiarity with the procedural history and underlying facts in this case are assumed.

By Decision and Order dated April 3, 2024, ("the Decision and Order"), this Court (a) granted Plaintiffs' motion to the extent that Oxford Gardens was declared to be an Additional Insured under the Gotham insurance policy; (b) determined that Oxford Gardens was NOT entitled to defense under the Gotham policy due to the "Primary and Noncontributory – Other Insurance Condition" endorsement in the policy; (c) denied Plaintiffs' motion seeking an order directing Defendant to reimburse Fireman's Fund for defense costs and expenses incurred in defending the underlying action, (d) denied Plaintiffs' motion for fees and costs associated with the within action;

¹ The documents numbered 90-92 have not been considered. Submitted as "Affirmation in Further Support of Cross Motion", they are in fact, Sur-Reply papers which are not permitted by either the CPLR or the Part Rules.

² It is unnecessary to cross move for an order denying a motion. If Plaintiffs fail to demonstrate their entitlement to the relief sought, their motion will be denied. Cross moving for denial of a motion is superfluous.

and (e) granted Defendant's motion to the extent that it was determined that Gotham owed no duty to defend Plaintiffs in connection with the underlying personal injury action. (Decision and Order, NYSCEF # 59 and 60). Plaintiffs now move to reargue the Decision and Order to the extent that they seek a declaration that they are entitled to reimbursement of defense fees in the underlying action. Plaintiffs assert that the Court overlooked or misapprehended matters of fact or law.

Defendant opposes Plaintiffs' motion and cross moves for summary judgment in its favor. Defendant asserts that the Court's Decision and Order was correct in all respects. Defendant contends that Plaintiffs failed to establish their entitlement to reargument. Further, Defendant submits that it is entitled to summary judgment because "Oxford has not incurred any out of pocket expenses defending itself in the underlying action." NYSCEF # 86, p7. As evidence that Oxford is not out of pocket, Defendant submits Plaintiffs' response to its Notice to Admit whereby Oxford admits that its defense expenses are being paid by Fireman's Fund.

Plaintiffs reply to Defendant's opposition and cross motion, asserting that Defendant's cross motion is, in fact, an untimely motion to reargue the portion of the Decision and Order which denied its motion for summary judgment. Plaintiffs submit that Defendant previously moved for summary judgment (motion seq #2) and that its motion was denied in the Decision and Order. Plaintiffs contend that the instant cross motion seeks the same relief as the prior motion and, therefore, should have been brought no later than May 4, 2024 (30 days from Notice of Entry) but was not filed until June 24, 2024 (81 days after Notice of Entry). Plaintiffs assert further that there are no new facts which would warrant the Court allowing a second motion for summary judgment, or a motion to reargue.

Plaintiffs' Motion to Reargue

Plaintiffs assert that the Court incorrectly found that although Oxford is an additional insured under the policy issued by Gotham, the Court also held that the Gotham policy was not a primary policy under which Gotham is obligated to pay defense costs. Plaintiffs contend that the Court failed to "take into consideration the language contained in the policies of both Gotham or of plaintiff Fireman's Fund Insurance or the applicable law." NYSCEF # 64, ¶ 13.

CPLR § 2221(d) provides, in relevant part, that:

A motion for leave to reargue: 1. shall be identified specifically as such; 2. shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion, but shall not include any matters of fact not offered on the

prior motion; and 3. shall be made within thirty days after service of a copy of the order determining the prior motion and written notice of its entry.

“A motion for leave to reargue is addressed to the sound discretion of the Supreme Court”. *Rides Unlimited of New York, Inc. v Engineered Energy Solutions, LLC*, 184 AD3d 695, 695 [2nd Dept 2020]; *Bueno v Allam*, 170 AD3d 939, 940 [2nd Dept 2019]; *Foley v Roche*, 68 AD2d 558, 567 [1st Dept 1979].

“A motion for reargument, addressed to the discretion of the court, is designed to afford a party an opportunity to establish that the court overlooked or misapprehended the relevant facts, or misapplied any controlling principle of law. Its purpose is not to serve as a vehicle to permit the unsuccessful party to argue once again the very questions previously decided. Nor does reargument serve to provide a party an opportunity to advance arguments different from those tendered on the original application. It may not be employed as a device for the unsuccessful party to assume a different position inconsistent with that taken on the original motion. ... ‘A motion for reargument is not an appropriate vehicle for raising new questions’”. *Foley* at 567-568; *Jaspar Holdings, LLC v Gotham Trading Partners #1, LLC*, 186 AD3d 582, 584 [2nd Dept 2020]; *McGill v Goldman*, 261 AD2d 593, 594 [2nd Dept 1999]; *DeSoignies v Cornasesk House Tenants’ Corp.*, 21 AD3d 715, 718 [1st Dept 2005].

The Court has reviewed the Decision and Order and the insurance policies at issue. That review reveals that the Court did not misapprehend any issues of fact or law. As such, reargument is denied.

Defendant’s Motion for Summary Judgment

Defendant moves for Summary Judgment and dismissal of Plaintiffs’ complaint. As Plaintiffs correctly point out, Defendant’s motion must be denied as it previously moved for Summary Judgment in motion sequence #2.

“Successive motions for summary judgment should not be entertained in the absence of good cause, such as a showing of newly discovered evidence” because “[s]uccessive motions for the same relief burden the courts and contribute to the delay and cost of litigation.” *Deutsche Bank Natl. Trust Co. v Elshiekh*, 179 AD3d 1017, 1020 [2nd Dept 2020]. “[E]vidence is not newly discovered simply because it was not submitted on the prior motion; rather, the evidence must not have been available to the party at the time it made its initial motion and could not have been

established through alternative evidentiary means.” *Id.* Defendant has failed to demonstrate that there is good cause for the Court to entertain its second motion for summary judgment.

Consequently, Defendant’s motion for summary judgment is hereby denied.

SUMMARY

It is hereby

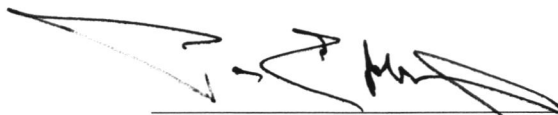
ORDERED that Plaintiffs’ motion seeking reargument is denied in all respects; and it is further

ORDERED that Defendant’s cross motion seeking summary judgment is denied in all respects.

The foregoing constitutes the Decision and Order of the Court.

Dated: January 6, 2025
White Plains, New York

E N T E R


HON. PAUL I MARX, J.S.C.